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No. 86-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLEY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY, and RICK BERNAS,

Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS, and ROBERT JENSEN,

Respondents.

PETITIONERS' REPLY BRIEF

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THE PETITION FOR CERTIORARI SHOULD BE GRANTED, THE JUDGMENT VACATED, AND THE CASE REMANDED FOR FURTHER CONSIDERATION.

I. Introduction

Respondents' Opposition to Petition for Writ of Certiorari achieves the rather remarkable feat of mischaracterizing petitioners' argument or misstating the record or both in virtually every paragraph. This reply in support of the petition is therefore necessary, if

only to permit this Court to comprehend the true basis for the petition and thus consider it on its merits.

II. Argument

To reiterate, the issue facing the courts below was whether "summary judgment in favor of [defendants] on the basis of the relevant statute of limitations" was proper. *Lacina v. G-K Trucking*, 802 F.2d 1190, 1191 (9th Cir. 1986), App. A4. To that end, those courts were required to determine whether "[plaintiffs' cause of action was filed December 3, 1982", *id.* at 1191-92, App. A5, or whether an earlier filing on November 10, 1982 was effective, *see id.* at 1192 n.2, App. A5 n.2.

The November 10 date was rejected solely and exclusively due to the file *and serve* requirement of *Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1440-41 (9th Cir. 1986), *vacated and remanded*, 107 S.Ct. 1881 (1987). Pithily, but plainly, the Court of Appeals, citing *Gallon*, ruled that "[b]ecause the November 10 complaint was never served, it does not mark the date of the filing of plaintiffs' action for purposes of the statute of limitations". 802 F.2d at 1192 n.2, App. A5, n.2.

Hence, far from being an afterthought or dicta as respondents wishfully suggest, the holding of the Court of Appeals that the November 10 filing was not effective because it was not "*served* within the six-month limitations period", *id.* (emphasis in the original), was an essential conclusion supporting its judgment. And that holding was repudiated and rejected by *West v. Conrail*, 107 S.Ct. 1538, 1541-52 (1987). Accordingly, notwithstanding the respondents'

obfuscation, the Court of Appeals "decided an important question of federal law . . . in a way in conflict with [an] applicable decision[ ] of this Court". Sup.Ct.R. 17.1(c).

The pervasive fallacy that infects respondents' argument from beginning to end is the *assumption* that the complaint that "mark[ed] the date of the filing of plaintiffs' action for purposes of the statute of limitations", 802 F.2d at 1192 n.2, App. A5 n.2, is the one filed on December 3 and held untimely, not the one submitted on November 10. But whether the November 10 complaint is effective for statute of limitations purposes is the very issue erroneously decided by the Court of Appeals that petitioners wish to have reconsidered by that court.

Under the line of cases beginning with *Loya v. Desert Sands Unified School District*, 721 F.2d 279, 281 (9th Cir. 1983), and only recently reaffirmed and expanded by *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917, 919-21 (9th Cir. 1987), petitioners are confident that this issue would be decided in their favor. That is, the Court of Appeals would decide that petitiners "constructively filed" their complaint when, on November 10, 1982, they "delivered it to the clerk of the court, though [it] was not in compliance with local ruels". *Id.* at 921.[1]

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[1] Contrary to respondents' repeated assertions, the November 10 complaint was returned, not rejected, by the district court clerk because it failed to comply with the local rules of court, not the federal rules of civil procedure. But *Cintron* holds that the *Loya* principle applies even to filings returned for failure to comply with federal statutory requirements, *see* 813 F.2d at 920, and a fortiori it also applies to the rules of civil procedure. Consequently,

Whether or not petitioners will prevail on this issue or upon the other issues in the case such as the date their cause of action accrued are, however, matters that properly should be considered by the Court of Appeals free from its former misapprehension as to the law. And such consideration is all that petitioners seek.[2]

III. Conclusion

In sum, the opinion of the Court of Appeals for the Ninth Circuit in this action is irreconcilably in conflict with a very recent opinion of this Court on an issue of law that is possibly decisive as to the outcome of the case. Accordingly, the petition for certiorari should be granted, the judgment vacated, and the matter remanded for further consideration in light of *West v. Conrail*.

On remand, the Court of Appeals can and must decide for itself the questions that are *not* presented by this petition for certiorari, whether the complaint in fact was filed constructively on November 10, 1982 and, if so, whether the complaint nevertheless was untimely. Petitioners ask only that this Court vacate the decision and judgment below, thus permitting their action to be adjudicated pursuant to principles of civil

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respondents' distortion of the record is of no moment.

[2] For this reason respondents' observations concerning the uniqueness of the factual situation and the low likelihood that it will recur are beside the point. Petitioners are not asking that this Court grant plenary review, only that the judgment below be vacated and the cause remanded for futher proceedings pursuant to a correct legal premise.

law enunciated while it was still sub judice. In order to achieve that eminently just result, the petition for certiorari should be granted.

Dated: June 9, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on June 9, 1987, I served the within *Petitioners' Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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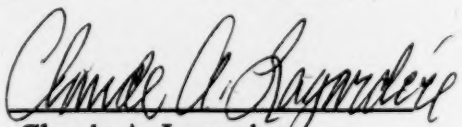
I declare under penalty of perjury that the foregoing is true and correct. Executed on June 9, 1987, at Los Angeles, California.



Claude A. Lagardere
(Original signed)